

Real Estate Litigation and Counseling

“And One Day the Axe Just Fell”- DC District Court Holds Eviction Order Invalid Nationally

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Order Held Unlawful Once Again, This Time The Order Is National In Scope

We write to follow up on our March 4, 2021 client alert, “[The Order is Rapidly Fadin’](#),” and our March 16, 2021 supplement, “[‘Like a Rolling Stone’: Federal Courts Continue to Find CDC Order Unlawful](#).” The prior alerts discussed the evolving case law regarding the Centers for Disease Control and Prevention’s (CDC) order prohibiting most residential evictions for nonpayment of rent (CDC Order). We now write to update you about the most recent—and most impactful—decision to date: the District Court for the District of Columbia’s order invalidating the CDC Order nationwide.

On May 5, 2021, Judge Dabney L. Friedrich granted plaintiff’s motion for summary judgment, holding that the CDC Order extended beyond the statutory authority of the agency.^[1] This is the fourth federal court to strike down the CDC Order.^[2] Similar to the courts in *Tiger Lily, LLC* and *Skyworks, Ltd.*, the court determined that the statutory language of the Public Health Act^[3] specifically forecloses the CDC’s interpretation of its authority to issue the eviction moratorium. Citing the Public Health Act, the court noted that the CDC “may provide for such inspections, fumigations, disinfection, sanitation, pest extermination [and] destruction of animals or articles” found to be a likely source of infection.^[4] The court noted that while the Secretary of Health and Human Services, through the CDC director, may “provide for other measures, as in his judgment may be necessary . . . any such other measures are controlled and defined by reference to the enumerated categories.”^[5] Further, “any regulations enacted pursuant to § 264(a) must be directed toward specific targets found to be sources of infection.”^[6] Without such a requirement, “so long as the Secretary can make a determination that a given measure is ‘necessary’ to combat the interstate or international spread of disease, there is no limit to the reach of his authority.”^[7]

Based on this interpretation of the Public Health Act, the court concluded that the eviction moratorium extends beyond the authority of the agency. The court reasoned that, first, the moratorium is not related to inspection, fumigation, disinfection, sanitation, extermination, or destruction of potential sources of infection. Second, the definition of the term “articles” as used in the statute cannot include “evictions” because doing so “would stretch the term beyond its plain meaning”^[8] and holding that the CDC could interpret the statute in such a broad way would raise serious constitutional concerns regarding delegation of legislative authority. Finally, notwithstanding the agency’s argument that Congress explicitly ratified the CDC’s interpretation when it extended the eviction moratorium through the end of January 2021, Congress did not “expressly approve of the agency’s interpretation of 42 U.S.C. § 462(a) or provide the agency with additional statutory authority.”^[9]

This opinion largely mirrors, and often cites, the opinions in *Tiger Lily* and *Skyworks*. However, unlike the previous decisions, which only invalidated the order within each court’s judicial district, Judge Friedrich’s ruling invalidates the CDC Order nationwide. The order accompanying the opinion states “that the nationwide eviction moratorium issued by the Centers for Disease Control and Prevention, and currently in effect at 86 Fed. Reg. 16,731, is **VACATED**.”^[10] And while the agency argued that the court should limit its opinion to only the plaintiffs standing before the court, the court rejected this

argument because “when regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioner is proscribed.”^[11]

The government has appealed the decision and filed an emergency motion for stay pending appeal. In response to the motion for stay, the court issued an administrative stay “[i]n order to give the Court time to consider the merits of the defendants’ Emergency Motion for a Stay Pending Appeal, and the plaintiffs time to file an opposition to the motion.”^[12] Plaintiffs’ response in opposition is due May 12, 2021, with Defendants’ reply due four days after plaintiffs file their response.

Related FDCPA Issues

In conjunction with the CDC’s Order, the Consumer Financial Protection Bureau (CFPB) issued an interim final rule interpreting the Fair Debt Collection Practices Act (FDCPA), which became effective May 3, 2021. The rule requires debt collectors initiating eviction proceedings to alert delinquent renters about their rights under the CDC’s Order. While landlords are not considered debt collectors under the FDCPA,^[13] third-party debt collectors, including attorneys who file eviction cases on behalf of landlords, are included.^[14]

A new lawsuit has been filed in the Middle District of Tennessee challenging this rule.^[15] The lawsuit notes that the CDC Order has been struck down by the Western District of Tennessee,^[16] and the Sixth Circuit has refused to stay the decision because the government has a low likelihood of winning on the merits.^[17] Because of the Court of Appeals’ opinion denying the stay and its language that Congress did not “grant the CDC the power it claims it has,” the plaintiffs argue that debt collectors within the Sixth Circuit who issue notices about rights under the CDC Order would be misleading delinquent tenants—which is itself a violation of the FDCPA.^[18] The suit further alleges that because the CFPB rule forces debt collectors to make false statements, it constitutes forced speech under the First Amendment. The plaintiffs seek a temporary restraining order banning the CFPB from enforcing the rule. The complaint was filed two days before the decision in *Alabama Association of Realtors*. Given that decision invalidates the CDC Order on which the CFPB Rule relies, the Rule will likely also fall.

We will continue to track relevant decisions and be a resource for those also monitoring these important matters concerning constitutional and property rights.



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[1] *Ala. Ass'n of Realtors et al. v. U.S. Dep't of Health & Human Servs.*, No. 1:20-cv-0377 (D.D.C. May 5, 2021).

[2] *Terkel et al., v. Centers for Disease Control, et al.*, No. 6:20-cv-00564, 2021 WL 742877 (E.D. Tex., Feb. 25, 2021); *Skyworks, Ltd. et al v. Centers for Disease Control, et al*, No. 5:20-cv-2407, 2021 WL 911720 (N.D. Ohio Mar. 10, 2021); *Tiger Lily, LLC et al v. U.S. Dep't of Housing & Urban Dev. et al*, No. 2:20-cv-02692-MSN-act, 2021 WL 1171887 (W.D. Tenn. Mar. 15, 2021).

[3] 42 U.S.C. § 264(a).

[4] Opinion, *Ala. Ass'n of Realtors et al. v. U.S. Dep't of Health & Human Servs.*, No. 1:20-cv-0377, ECF No. 54 at 11 (D.D.C. May. 5, 2021) (citing 42 U.S.C. § 264(a)).

[5] *Id.* at 11.

[6] *Id.* (quotations omitted).

[7] *Id.* at 15.

[8] *Id.* at 12.

[9] *Id.* at 18.

[10] Order, *Ala. Ass'n of Realtors et al. v. U.S. Dep't of Health & Human Servs.*, No. 1:20-cv-0377, ECF No. 53 at 1 (D.D.C. May. 5, 2021).

[11] Opinion, *Ala. Ass'n of Realtors et al. v. U.S. Dep't of Health & Human Servs.*, No. 1:20-cv-0377, ECF No. 54 at 19 (D.D.C. May. 5, 2021).

[12] Minute Order, Opinion, *Ala. Ass'n of Realtors et al. v. U.S. Dep't of Health & Human Servs.*, No. 1:20-cv-0377 (D.D.C. May. 5, 2021).

[13] Debt Collection Practices in Connection With the Global COVID-19 Pandemic (Regulation F), 86 Fed. Reg. 21163-01.

[14] Debt Collection Practices in Connection With the Global COVID-19 Pandemic (Regulation F), 86 Fed. Reg. 21163-01.

[15] *The Property Mgmt. Connection, LLC, et al. v. Consumer Fin. Prot. Bureau, et al.*, No. 3:21-cv-00359 (M.D. Tenn. May 3, 2021).

[16] *Tiger Lily*, 2021 WL 1171887.

[17] *Tiger Lily, LLC v. U.S. Dep't of Hous. & Urb. Dev.*, 992 F.3d 518, 522 (6th Cir. 2021).

[18] Compl. at 11, *Property Mgmt. Connection, LLC*, No. 3:21-cv-00359 (M.D. Tenn. May 3, 2021) (citing *Tiger Lily*, 992 F.3d at 522).

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